

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*PHAM v MINISTER FOR IMMIGRATION & ANOR*

[2018] FCCA 1930

## Catchwords:

MIGRATION – Partner visa application – review of decision of Administrative Appeals Tribunal – whether the Tribunal failed to provide an opportunity to the applicant to respond to dispositive findings it had made – whether the Tribunal applied the incorrect test in determining the applicant’s spousal relationship – whether the Tribunal’s reasons were infected by illogicality, irrationality or unreasonableness – no jurisdictional error – application be dismissed.

## Legislation:

*Migration Act 1958* (Cth), ss.5F, 360

*Migration Regulations 1994* (Cth), reg.1.15A, cl.801.221 of sch.2

## Cases cited:

*SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs*  
(2006) 228 CLR 152

|                          |                                                 |
|--------------------------|-------------------------------------------------|
| Applicant:               | DINH KIEN PHAM                                  |
| First Respondent:        | MINISTER FOR IMMIGRATION &<br>BORDER PROTECTION |
| Second Respondent:       | ADMINISTRATIVE APPEALS<br>TRIBUNAL              |
| File Number:             | SYG 2209 of 2017                                |
| Judgment of:             | Judge Smith                                     |
| Hearing date:            | 14 June 2018                                    |
| Date of Last Submission: | 14 June 2018                                    |
| Delivered at:            | Sydney                                          |
| Delivered on:            | 14 June 2018                                    |

## **REPRESENTATION**

Counsel for the Applicant: Mr A Kumar

Solicitors for the Applicant: Vietaust Lawyers

Counsel for the First Respondent: Mr T Reilly

Solicitors for the Respondents: Australian Government Solicitor

## **ORDERS**

- (1) The application be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$6,000.
- (3)

# **FEDERAL CIRCUIT COURT**

## **OF AUSTRALIA**

### **AT SYDNEY**

**SYG 2209 of 2017**

**DINH KIEN PHAM**

Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**

First Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**

Second Respondent

## **REASONS FOR JUDGMENT**

### **(Delivered Extempore and Revised)**

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal made on 14 June 2017. The Tribunal affirmed a decision of a delegate of the Minister to refuse to grant the applicant a Partner (Residence) (class BS) visa.
2. The applicant is a citizen of Vietnam who arrived in Australia in June 2008 on a student visa. On 2 March 2012 he applied for two visas on the basis of his marriage to an Australia citizen. Those visas were a Partner (Temporary) (class UK) visa and a Partner (Residence) class BS visa.

3. The applicant was granted the first of these visas on 26 April 2012. The two visas work together so that once the first of them, a temporary visa, is granted, the second visa application will be considered after a certain period, normally two years or more. At that time, the applicant would have to satisfy the criterion in sub-cl.801.221(2)(c) of sch.2 to the *Migration Regulations 1994* (Cth), namely, that the applicant is the spouse or de facto partner of the sponsoring partner. The sponsoring partner in this case was the applicant's wife.
4. Section 5F of the *Migration Act 1958* (Cth) defines spouse for the purpose of the Act and Regulations:
  - (1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.
  - (2) For the purposes of subsection (1), persons are in a married relationship if:
    - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
    - (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
    - (c) the relationship between them is genuine and continuing; and
    - (d) they:
      - (i) live together; or
      - (ii) do not live separately and apart on a permanent basis.
  - (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.
5. Regulation 1.15A makes provisions pursuant to and for the purposes of s.5F, and sets out the matters that have to be considered by a decision-maker in determining whether or not the visa applicant satisfies the spouse criteria for the visa.

6. Regulation 1.15A provides the following:

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
  - (i) any joint ownership of real estate or other major assets; and
  - (ii) any joint liabilities; and
  - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
  - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
  - (v) the basis of any sharing of day-to-day household expenses; and
- (b) the nature of the household, including:
  - (i) any joint responsibility for the care and support of children; and
  - (ii) the living arrangements of the persons; and
  - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:

- (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.
  - (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).
7. On 20 February 2015 a delegate of the Minister decided to refuse to grant the visa. However, that decision was ultimately quashed by consent orders made in the High Court. The matter was considered again by a different delegate who, on 25 August 2016, made a decision to refuse to grant the applicant a visa.
  8. The delegate found that cl.801.221 of sch.2 to the Regulations was not satisfied. Essentially, having considered all of the aspects relevant to the determination of the existence of a spousal relationship, the delegate was not satisfied there was a genuine and continuing relationship with the applicant's sponsor. Amongst the matters considered by the delegate were the financial circumstances of the applicant, and in particular, the bank statements produced by the applicant to support the contention that there was pooling of finances.
  9. The applicant applied to the Tribunal for review of that decision and attended the hearing conducted by the Tribunal on 18 May 2017. His

wife also attended that hearing and gave evidence before the Tribunal. The Tribunal handed down its decision on 14 June 2017 affirming the delegate's decision. The Tribunal's reasons for decision have been summarised accurately in the first respondent's written submissions at [6] to [14] which I adopt for the purpose of this judgment and set out below:

6. The Tribunal identified that the central issue of the review was whether, at the time of decision, the applicant continues to be the "spouse" of the sponsor. "Spouse" is defined in s 5F(2) of the *Migration Act 1958* (the Act).
7. The Tribunal summarised the procedural history and the background of the matter, including the delegate's decision and various supporting documents. The Tribunal then summarised what occurred at the Tribunal hearing, including the evidence given by the applicant and the sponsor in relation to their overseas travel and the various aspects of their relationship.
8. The Tribunal found that the evidence given by the applicant and the sponsor at times to be vague and imprecise. The Tribunal noted that it had accessed information about the parties' overseas travel, which was inconsistent with their oral evidence given at the hearing, and had given that information to the applicant for comment pursuant to s 359AA of the Act. The Tribunal set out the particulars of the information and the applicant's responses to that information. The Tribunal noted the migration agent's submissions and was not satisfied that the applicant's responses sufficiently explained the inconsistencies between the information and the applicant's evidence. The Tribunal noted that although it was required to consider the nature of the parties' relationship, it attached significant weight to the inconsistencies in its assessment of the parties' credibility.
9. The Tribunal set out the relevant legislative framework. The Tribunal found that the parties are validly married for the purpose of s 5F(2)(a) of the Act. It proceeded to consider the matters in reg 1.15A(3) of the Regulations.
10. In relation to the financial aspect of the relationship, the Tribunal noted that:
  - although the parties provided records of their joint bank account, they provided no recent records of their individual bank accounts

- there were some evidence that the joint account was used for pay for daily expenses
- although the car insurance premium was paid from the joint account, the car was not considered to be a joint asset. The parties had no joint assets despite being married since 2011
- it could not be satisfied that cash deposits were made by the applicant. There were limited transfers made by the sponsor and that there were instances where the funds deposited into the joint account by the sponsor were later transferred back to her. There were also some transfers from an unidentified third party
- In the circumstances, the Tribunal found that there was a very limited amount of sharing of regular expenses between the parties. That conclusion was influenced by the credibility concerns that the Tribunal had about the parties' evidence. The Tribunal was not satisfied that the financial aspect of the parties' relationship supported the genuineness of the relationship

11. In relation to the nature of the household, the Tribunal noted that:

- the sponsor and the applicant gave inconsistent evidence when they were simultaneously interviewed by Department as to when they moved to their current residence, how they found and secured their current rental property and what they ate on the night before the interview. Those inconsistencies were not adequately explained by the parties
- these inconsistencies raised the possibility that the parties may not have resided together as claimed and undermined their credibility
- although utility bills and insurance policies were addressed to the parties at the parties' current residential address, they do not in and of themselves establish where people live. The majority of correspondences are solely addressed to the applicant at the parties' current residential address and none were solely addressed to the sponsor at that address.
- although the parties gave consistent evidence that the applicant does the cooking and cleaning, it was not corroborated by any independent evidence.



- in light of its credibility concerns, the Tribunal was not satisfied that the evidence established the parties were living together at the time of its decision or the genuineness of their relationship.
12. In relation to the social aspects of the relationship, the Tribunal was concerned that the parties had not provided any recent statement from their relatives and friends to support the genuineness of their relationship. The Tribunal placed no weight on photos from 2012 to 2015 as they were not recent, but it placed some weight on photos taken in 2016. Further, the Tribunal found that the overseas trips the parties have made without each other since their marriage did not support the genuineness of their relationship. The Tribunal was not satisfied that the social aspects of the parties' relationship was indicative of a couple in a genuine and continuing relationship.
  13. In relation to the nature of the parties' commitment to each other, the Tribunal placed some weight on the length of their marriage. The Tribunal placed no weight on WeChat records from 2015 as they were not recent. The Tribunal found that there was limited evidence to indicate that the parties were working collaboratively towards meeting the goals and aspirations for their future. The Tribunal was not satisfied that the nature of the parties' commitment to each other establish that they are in a genuine relationship.
  14. In light of these findings and its credibility concerns about the evidence of the parties, the Tribunal affirmed the decision not to grant the visa on the basis that the applicant was not in a spousal relationship with the sponsor.

(References removed)

10. In his amended application, the applicant includes six grounds of review. However, at the hearing today he only pressed the first aspect of ground 1, ground 3 and grounds 4 and 5. For those reasons, I will not deal with the balance of the grounds in the amended application.
11. The first ground focuses on [44] of the Tribunal's reasons. In that paragraph, the Tribunal was addressing the financial aspects of the relationship in accordance with the requirement of sub-reg.1.15A(3)(a).
12. It referred in [44] to the sponsor's individual account which ended with the digits 3462 and noted that amongst the transactions in that account

there were instances where funds were transferred back to the sponsor's account within a short period of time of being deposited into the joint account. It also noted, and this was the focus of the ground, that there were transactions between the joint account and another account which ended in the digits 1586 which did not correspond with the records of either the applicant's or the sponsor's individual accounts that were provided by the applicant with the visa application.

13. The applicant says that the reference by the Tribunal to the account ending in the digits 1586 was a determinative and dispositive issue in the review and that the Tribunal breached s.360 of the Act by not giving the applicant an opportunity to be heard on the issue. Section 360 requires the Tribunal to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
14. The difficulty with this ground is that the relevant aspect of the Tribunal's reasons, which have been the focus of the ground, is no more than an objective assessment of the material put before the Tribunal and the delegate before it by the applicant for the purposes of: first, the visa application, and secondly, the application for review. As such, the Tribunal was under no obligation to give an explicit opportunity at the hearing to the applicant to address the possibility that the Tribunal might make such a finding: see *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 at [48]. For that reason, the first ground of the application must be rejected.
15. The third ground is that the Tribunal committed jurisdictional error by failing to ask the correct question concerning the applicant and the sponsor's demonstration of commitment to family and a wider group of people. This ground is focused on [56] of the Tribunal's reasons, and in particular, the statement in the last sentence, that:

... the tribunal considers the trips the parties have made without each other, since their marriage, do not support the proposition they represent themselves to the community at large as two people in a genuine and continuing relationship.

16. The applicant argued that there was no requirement under the Act and Regulations for the Tribunal to consider any representation by the

parties to the “community at large” but rather that the Tribunal ought to have focused simply on how the applicant and his wife presented themselves to their friends and relatives, namely, people who knew them. The applicant supported that argument by reference to sub-reg.1.15A(3)(c)(ii) of the Regulations, namely:

the opinion of the persons’ friends and acquaintances about the nature of the relationship...

17. That argument however ignores the context of that particular requirement. The first matter that must be recalled is that the overarching obligation in determining whether the criterion is satisfied is set by s.5F of the Act, and in particular, whether in terms of sub-s.5F(2)(c), the relationship between the applicant and his wife is genuine and continuing. While s.5F(3) provides that the Regulations may make provisions in relation to the determination of whether one of those conditions is met, it does not limit the factors that may be considered for the purpose of s.5F(2). That is further borne out by reference to the Regulations itself, which in reg.1.15A(2), requires the Minister to consider “all of the circumstances of the relationship” and then goes on to state that those circumstances include the matters set out in sub-reg.(3).
18. That means that the Tribunal will not err if it considers an aspect of the relationship which is not expressly referred to in sub-reg.(3). In any event, sub-reg.(3) does not limit the consideration by the Minister or the Tribunal in the way suggested by the applicant. Sub-regulation 1.15A(3)(c) refers to the social aspects of their relationship and then sets out three matters which are included in that social aspect. Once again, the Tribunal is not limited by sub-reg.(3)(c) to only those three matters, because of the word “including” in the chapeau to sub-para. (c).
19. Finally, it is obvious from sub-reg.1.15A(3)(c)(i) that it is expressly relevant how the parties to the relationship represent themselves to other people. When the Tribunal referred at [56] to the way that the applicant and his wife represented themselves to the “community at large” that was no more than a paraphrase of the requirements set out by sub-reg.1.15A(3)(c), and in particular, sub-para.(i). For all of those reasons, the argument in support of ground 3 must be rejected.

20. Grounds 4 and 5 focus on [45] of the Tribunal's reasons. Ground 4 asserts that there was an illogicality, irrationality or unreasonableness in the Tribunal's reasons in [45], and ground 5, relying on the same grounds of illogicality, irrationality and unreasonableness, asserts that there was procedural unfairness. They are in effect two aspects of the same argument and can be dealt with together as they were in the applicant's oral submissions.
21. The ground is based upon the assertion that the Tribunal proceeded on the basis of an assumption that the applicant and his wife should have owned a house at the time of the decision or at least should have accumulated a certain level of assets. However, the Tribunal made no such assumption. It stated:
45. ... The tribunal finds it troubling the parties have not have accumulated shared assets, or be further along towards previously stated goals, such as home ownership, in the five and a half years since their marriage.
- (Without alteration)
22. It is obvious from any reading of that sentence that the Tribunal made no assumption but rather was troubled by the current level of the joint financial position of the parties. That is made clear by the alternative facts referred to in the sentence noted by the word "or" in it.
23. The question about home ownership was not something that the Tribunal came up with itself. As it noted, there was a previously stated goal of home ownership. This was a matter that was expressed by the applicant himself in a statement given to the Tribunal, namely, that it was their hope to have enough money to buy a home. The point made by the Tribunal at [45] was not that the applicant and his wife did not own a home, rather, that they had not travelled very far along the goal that they themselves or the applicant himself at least, had set, in spite of the fact that the relationship had been on foot for over five and a half years.
24. For those reasons, the underlying premise of both grounds 4 and 5 is not made out and for that reason grounds 4 and 5 must be rejected.

## Conclusion

25. I am not satisfied that there is any jurisdictional error in the Tribunal's reasons. The application must be dismissed.

---

**I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Judge Smith**

Associate:

Date: 16 July 2018